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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC. and DR. THOMAS F. WADDELL,
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC.; THE NATIONAL ASSOCIATION OF OLYMPIC BUSINESSES, (Continued within) IN SUPPORT OF PETITIONER

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BRIEF OF THE AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC. THE NATIONAL ASSOCIATION OF OLYMPIC BUSINESSES, THE CENTER FOR CONSTITUTIONAL RIGHTS, AND MARY C. FIGLIULO, KATHERINE J. KREBS, LESLIE H. BALMAIN, ROBERT J. BARNETT, CARL GOODMAN, AND SUSAN BARNETT

INTEREST OF AMICI CURIAE

This brief amici curiae in support of Petitioners San Francisco Arts & Athletics (the "SFAA") and Thomas P. Waddell is submitted on behalf of The Amateur Athletic Union of the United States, Inc. (the "AAU"), The National Association of Olympic Businesses, The Center for Constitutional Rights, Mary C. Figliulo, Katherine J. Krebs, Leslie H. Balmain, Robert J. Barnett, and Carl Goodman.

The AAU is an amateur sports organization which sponsors athletic competitions and other sports programs for amateur athletes of all ages. The

National Association of Olympic Business is an association of commercial businesses which use the word olympic as part of their individual names, but which do not conduct athletic events. Mary C. Figliulio, Katherine J. Krebs, Leslie H. Balmain, Robert J. Barnett, Carl Goodman, and Susan Barnett, who were all either spectators or participants in the Gay Games of 1982 and 1986.[1]

In this brief, Amici provide the Court with information about the intent of Congress in granting protection to Respondent United States Olympic Com-

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[1]The qualifications of the AAU, The National Association of Olympic Businesses, The Center for Constitutional Rights, Mary C. Figliulo, Katherine J. Krebs, Leslie H. Balmain, Robert J. Barnett, Carl Goodman, and Susan Barnett as Amici are set forth in detail in the Appendix to this Brief.

mittee (the "USOC") for the words "Olympic," "Olympiad," "Citius Altius Fortius," and words similar thereto (the "USOC Designations"), and the resulting scope of that protection.

SUMMARY OF ARGUMENT

In the decision below, the United States Court of Appeals for the Ninth Circuit perpetuated an incorrect standard of protection for the USOC Designations. The statutory scheme for protecting the USOC Designations, set forth in the Amateur Sports Act of 1978 (the "Amateur Sports Act"),[2] is the same as that provided for the names of other federally chartered organizations and expressly refers to the remedies of the Trademark Act of 1946 (the "Lanham

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[2] 36 U.S.C. §371 et seq.

Act").[3]

The legislative history behind the Amateur Sports Act evidences the intent of Congress to provide the USOC with the conventional protection provided other federally charter organizations, against uses by others of phrases incorporating one or more of the USOC Designations. Congress specifically considered, but deleted by amendment, a proposal for providing sui generis protection for the USOC Designations.

It follows that the USOC Designations should not be accorded protection similar to that provided by state "anti-dilution" statutes, as the Respondents have argued. In support of this conclusion, it is noted that the

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[3]60 Stat. 427, as amended; 15 U.S.C. §1051 et seq.

Amateur Sports Act requires neither an injury to the business reputation of the USOC nor the dilution of the distinctive quality of the USOC Designations, at least one of which would be a predicate for a finding of dilution under state laws. Thus, the Respondent's interpretation of the Amateur Sports Act as providing anti-dilution protection seems to beg the question. Moreover, anti-dilution statutes are intended to protect strong marks like XEROX, not weak marks like OLYMPIC. In fact, when compared with most trademarks, the word OLYMPIC can be considered to have become a generic or merely descriptive term, incapable of broad protection in a dilution or a trademark sense.

The proper scope of protection for the USOC Designations should there-

fore be similar to that afforded trademarks under the Lanham Act. The USOC Designations should be protected against confusion, passing off, and other forms of unfair competition, but do not deserve, nor did Congress intend, any stronger protection. Moreover, the scope of protection for the USOC Designations is further limited by the affirmative defenses available to Defendants in infringement actions brought under the Lanham Act. The defenses of fair use, laches, and acquiescence are derived from the common law of trademarks, and do not require express mention in the Amateur Sports Act in order to limit the scope of protection afforded.

ARGUMENT

I. IN ENACTING THE AMATEUR SPORTS ACT OF 1978 CONGRESS INTENDED TO PROVIDE PROTECTION OF THE MARK "OLYMPIC" COMMENSURATE WITH THE PROTECTION PROVIDED TO OTHER FEDERALLY CHARTERED ORGANIZATIONS WITHIN THE PARAMETERS OF THE LANHAM ACT.

This case presents a very important opportunity for the Court to reassert the requirement that Congressional intent be carefully considered in construing federal statutes. Careful review of the legislative history should be required, and such review has not been made by federal courts previously construing 36 U.S.C. §380, the statute providing protection for the word "Olympic." This primacy of Congressional intent was emphasized in the interpretation of the Trademark Act of 1946 (Lanham Act) in the case Park 'N

Fly v. Dollar Park and Fly, 469 U.S. 189, 83 L.Ed.2d 582, 105 S.Ct. 658, 224 U.S.P.Q. 327 (1985), in which a similar failure to accord proper consideration to legislative history was criticized by the Court.

Of significance is the impact that the decision in this case will have on the scope of name protection rights that will be accorded to federally chartered organizations other than the USOC. This question does not appear to have been addressed by the Court since the case of FTC v. A.P.W. Paper, 328 U.S. 193, 90 L.Ed. 1165, 66 S.Ct. 932, 69 U.S.P.Q. 215 (1946). There the scope of protection for the words "Red Cross" was decided. As a result innocent users of generic words associated with federally chartered organizations have been placed in jeopardy.

A. **IN PASSING THE INITIAL UNITED STATES OLYMPIC ASSOCIATION INCORPORATION ACT OF 1950, CONGRESS INTENDED TO PREVENT ONLY FALSE DESIGNATIONS AND FRAUD IN THE USE OF USOC DESIGNATIONS**

The passage of the Amateur Sports Act of 1978 replaced provisions of the United States Olympic Committee Incorporation Act of 1950, including a provision relating to the protection of the word "Olympic" which read as follows:

> [I]t shall be unlawful for any person, corporation, or association ... for the purpose of trade, theatrical exhibition, athletic performance, and competition or as an advertisement to induce the sale of any article whatsoever or attendance at any theatrical exhibition, athletic performance, and competition or for any business or charitable purpose

> to use ... the words "Olympic," "Olympiad," or "Citius Altius Fortius," or any combination of these words... .If any person violates the provision of this section he shall be deemed guilty of a misdemeanor....[4]

By enacting the prior statute, Congress was concerned only with preventing false representations and fraud, as evidenced by the following excerpt from a committee report on that legislation:

> One particular problem which the association is faced with is the protection of the Olympic insignia. The International Olympic Committee holds each national Olympic Committee responsible for protecting the Olympic name and insignia from unlawful use. Thus, in order to protect its name and insignia from being used, section 9 of the bill provides that it would be a misdemeanor for

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[4]Pub. L. No. 805, c. 975, §9, 64 Stat. 899 at 901 (repealed, formerly codified at 36 U.S.C. §379).

> any person to falsely or fraudulently represent himself to be a member or agent of the organization for the purpose of soliciting, collecting, or receiving money or material, or to wear the insignia thereof for a fraudulent purpose or to use it fraudulently in connection with a commercial purpose.[5]

The legislative history associated with the statute supports an interpretation of the scope of prohibited uses of USOC Designations limited to an intent to defraud in connection with a commercial purpose.

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[5]S. Rep. No. 2523, 81st Cong., 2d Sess. (1950), reprinted in 1950 U.S. Code Cong. Serv. 3787.

B. **THE SUI GENERIS PROTECTION WITH RELATED REMEDIES IN EARLY VERSIONS OF THE AMATEUR SPORTS ACT OF 1978 WERE DELETED FROM THE FINAL VERSION OF THE ACT.**

An early version of the Amateur Sports Act of 1978, which was passed by the Senate, included a provision granting sui generis protection to the USOC for the word "Olympic." It read as follows:

> SEC. 110. (a) Without the consent of the Corporation [USOC], any person who -
>
> . . .
>
> (3) uses for the purposes of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition -
>
> . . .
>
> (D) the words "Olympic," "Olympian," "Olympiad," "Citius Altius Fortius," or any combination, simulation,

or confusingly similar derivative thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity; shall be liable in a civil action by the Corporation for the remedies provided in subsection (c) of this section.

. . .

(c) When a violation of any provision of this section is established in any civil action arising under this section, the Corporation shall be entitled to-

(1) obtain injunctive relief upon such terms as the court considers reasonable to prevent a violation or threatened violation of this section;

(2) recover the profits which the defendant accrued as a result of such violation;

(3) recover any damages sustained by the Corporation; and

(4) recover costs of the action, including, at the discretion of the court, the amount of reasonable attor-

ney's fees.[6]

The sui generis protection listed in the version of the legislation above (in subsection c, paragraphs 1-4) provides remedies especially formulated for the USOC Designations. It is significant that subsection c was subsequently deleted and replaced by a reference to the Lanham Act, as explained below.

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[6]124 Cong. Rec. 12866 (May 8, 1978).

C. **THE COMMITTEE REPORTS AND LETTERS DEMONSTRATE THE SPECIFIC INTENT OF CONGRESS TO PROHIBIT THE USE OF THE USOC DESIGNATIONS ONLY WHERE THEY WERE "TENDING TO CAUSE CONFUSION" AS PROSCRIBED BY THE LANHAM ACT.**

During Congressional Committee consideration of the proposed legislation, the following comments were made concerning the reasons for changing the protection provided for USOC designations:

> USOC would be able to protect certain symbols, emblems, trademarks, tradenames and words by civil action pursuant to the Trademark Act of 1946. Currently, the USOC charter provides a criminal penalty for use of certain symbols, emblems, or words which have proved to be unworkable, as to enforce it, a criminal intent needs to be

established.[7]

The Patent and Trademark Office, the administrative agency which examines and issues federal trademark registrations under the Lanham Act, at Congressional hearings on the Amateur Sports Act of 1978 offered illuminating testimony:

> The amendments made by section 110 of S. 2727, to which our comments are directed, would add to the list of designations whose unauthorized use is prohibited: . . . (3) a combination, simulation, or confusingly similar derivation of the words "Olympic," "Olympiad," or "Citius Altius Fortius," which would tend to cause confusion, mistake or deception, or which would falsely suggest a connection with the Corporation or any Olympic activity.

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[7]H.R. Rep. No. 95-1627, 95 Cong., 2d Sess. 10 (1978), reprinted in 1978 U.S. Code Cong. and Admin. News 7483.

In lieu of criminal penalties, section 110 provides that violators shall be subject to a suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427, 15 U.S.C. 1051 et seq., known as the Trademark Act of 1946).

. . .

Section 110(a)(4) makes actionable not only use of the words "Olympic," "Olympiad," "Citius Altius Fortius," and any combination thereof, but also any simulation or confusingly similar derivation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity. We believe that the phrase "or confusingly similar derivation" is too broad in scope and would encompass any designation with the root "Olymp." We therefore believe that the phrase should be deleted. In such case the word "or" should be inserted before the word "simulation."

Section 110 carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohi-

bitions, e.g., words described in section (a)(4) tending to cause confusion, to cause mistake, or to deceive with respect to the Corporation or any Olympic activity.[8] [Emphasis supplied.]

The last quoted sentence from the Commissioner of Patents and Trademarks indicates his understanding that the changes enacted only applied to words "tending to cause confusion" with respect to the USOC or its activities. Since the language "or confusingly similar derivation" was removed from the Act apparently in response to this criticism it is clear that a broad expropriation of all uses of the word "Olympic" was not intended by Congress. Here Congress considered expropriation

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[8] Id., at 38 and 7496 (September 12, 1978 letter from Donald W. Banner, Comm. of Patents and Trademarks, to House Judiciary Committee Chairman Danielson).

of all uses and clearly chose not to do so. This is also demonstrated by subsequent changes to the language of The Amateur Sports Act of 1978.

These initial provisions concerning the scope of protections for the term "Olympic" were modified as follows by the House acting as the Committee of the Whole House in what became the final version of the Act:

> SEC. 110. (a) Without the consent of the Corporation, any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition -
>
> . . .
>
> (4) the words "Olympic," "Olympiad," "Citius Altius Fortius," or any combination or simulation thereof, tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;

> Page 14, line 3: Strike "liable" and insert "subject to suit."
>
> Page 14, line 4: Strike "subsection (c) of this section," and insert: "the Act of July 5, 1946 (60 Stat. 427: popularly known as the Trademark Act of 1946)."[9]

The final paragraph of the amendments listed above indicates the deletion of sui generis protection in the subsection c, and replacement with a reference to the Lanham Act. Thus, it is clear Congress specifically did not intend to grant the USOC Designations sui generis protection and it did intend these designations be controlled by the parameters of the Lanham Act.

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[9]124 Cong. Rec. 37069 (October 13, 1978).

D. COMMENTS FROM MEMBERS OF CONGRESS MADE CONTEMPORANEOUSLY WITH THE PASSAGE OF THE AMATEUR SPORTS ACT OF 1978 EVIDENCE A CONGRESSIONAL UNDERSTANDING THAT THE ACT'S AMBIGUOUS LANGUAGE WAS TO BE CONSTRUED PURSUANT TO THE BOUNDARIES OF OTHER FEDERALLY CHARTERED ORGANIZATIONS AND THE LANHAM ACT.

Comments made on the floor of Congress contemporaneously with the consideration of the Amateur Sports Act of 1978 evidence an intent that the statute be viewed in the the same light of other federally chartered organizations. The comments concern the changes made in the protections provided for the USOC designations:

> Further, under the bill as amended, the Olympic Committee would be able to protect certain symbols, emblems, trademarks, tradenames and

words by a civil action pursuant to the Trademark Act of 1946.[10]

The USOC is granted exclusive use protection, typical in Federal Charters, with respect to the Olympic name, international symbol, and emblem. [Emphasis added.][11]

The bill significantly expands the purposes and powers of the U.S. Olympic Committee. In addition, the USOC is granted broadened "exclusive use" protection with respect to the Olympic symbol, emblem, and name.[12]

These statements which concern the USOC Designations being granted protec-

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[10]124 Cong. Rec. 31660 (September 26, 1978)(Comments of Rep. Danielson in a lengthy summary of various portions of the Amateur Sports Act of 1978).

[11]124 Cong. Rec. 31670 (September 26, 1978)(Comments of Rep. Moorhead of California summarizing the House Judiciary Committee report on the Amateur Sports Act of 1978).

[12]124 Cong. Rec. 35646 (October 11, 1978)(Comments of Rep. Kindness summarizing various provisions of the Amateur Sports Act of 1978).

tion similar to the names of other federally chartered organizations and subject to the provisions of the Lanham Act are significant. The statements demonstrate that at the time of the Act's passage, members of Congress considered the passage of the Amateur Sports Act of 1978 as having boundaries equivalent to those provided other federally chartered organizations and as implemented by the provisions of the Lanham Act.[13]

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[13]Of note is the absence of any legislative history demonstrating a Congressional intent to apply legal standards to the Amateur Sports Act of 1978 which are analogous to state anti-dilution statutes. As of 1983, the laws in 22 states provide a statutory basis for dilution protection, but there has been a divergence of interpretation of such statutes, and a hesitation to find dilution without a likelihood of confusion. See, V. Devitt, "Coping With Statutes Which 'Muddy the Waters' of Trademark Practice," 11 APLA Q. J. 236, 243-6 (1983).

As enacted, the relevant portions of the statute reads as follows:

> Without the consent of the Corporation [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition-
>
> . . .
>
> (4) the words "Olympic," ""Olympiad," "Citius Altius Fortius," or any combination or simulation thereof, tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity; shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946).[14]

The wording used by Congress is very complex and ambiguous. It is unclear what words are modified by the

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[14]36 U.S.C. §380.

clause beginning with the present participle "tending" and including four prepositional phrases ("to cause confusion," "to cause mistake," etc.). That clause probably modifies the predicate "words" at the beginning of subparagraph 4. This interpretation would mean that the use of the word "Olympic" is only prohibited when "tending to cause confusion...." The punctuation is not consistent with interpreting the "tending" clause as restricting only the meaning of the last clause ("any combination of simulation thereof") in the series including the word "Olympic." If such a meaning were intended, the conjunction "or" should have been placed between the words "Olympiad" and "Citius Altius Fortius"; and a semicolon should have replaced the comma

after "Citius Altius Fortius."[15] Legal commentators have extensively criticized the use of such juxtaposed modifiers in legal instruments, and have noted the lack of substantive clarity which may result from references to a series of nouns. R. Dickerson, The Fundamentals of Legal Drafting 101-4, 128-9 (2d ed. 1986); Kirk, "Legal Drafting: The Ambiguity of 'and' and 'or'", 2 Texas Tech. L.Rev. 235, 251-2 (1970-1).

A federal statute punctuated and constructed much like that in 36 U.S.C. 380 was considered in Porto Rico Railway, Light & Power v. Mor, 253 U.S. 345, 64 L.Ed. 944, 40 S.Ct. 516 (1920). The statute under consideration in that case read as follows:

[15]See, Webster's Standard American Style Manual 18 n.28, 46 n.7 (1985).

> Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico ... [Ibid., 253 U.S. at 347.]

The Court in Porto Rico concluded that the modifier "not domiciled in Porto Rico" applied to aliens as well as to American citizens, and modified each of the phrases in the series preceding it. The Court in that case carefully evaluated the intentions of Congress, and construed the ambiguous statute accordingly. The Porto Rico case provides strong precedent for construing 36 U.S.C. §380 as prohibiting uses of USOC designations only for uses "tending to cause confusion. . ." with USOC activities.

Congress expressly recognized the need to provide protection to the USOC from unfair competition by others using the USOC designations. This protection was envisioned as placing the Committee on an equal footing with other federally chartered organizations. This Congressional intent, combined with the explicit reference to the Lanham Act, indicates that the "Olympic" mark is to be accorded a scope of protection commensurate with the "likelihood of confusion" standard applied in like circumstances for other marks. There are a large number of existing federally chartered organizations that have similar statutory protection for their respective names.[16]

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[16]J. Gilson, Trademark Protection and Practice, §10.01[4] (1986)

II. THE USUAL STATE STATUTORY ANTI-DILUTION PROTECTION FOR STRONG MARKS WAS NOT INTENDED BY THE CONGRESS.

The USOC has argued in this case, and various courts have concluded in the past, that the standard to be used in protecting the USOC Designations is the same standard as that used in protecting certain marks under state anti-dilution statutes. That argument must fail in light of the purpose of anti-dilution statutes and the peculiar facts of this case.

The cases which have considered the scope of protection to be accorded to the word "Olympic" are: International Olympic Committee v. San Francisco Arts & Athletics, 781 F.2d 733, 228 U.S.P.Q. 585 (9th Cir. 1986); United States Olympic Committee v.

Intelicense Corp., 737 F.2d 2634, 222 U.S.P.Q. 766 (2d Cir. 1984); International Olympic Committee v. San Francisco Arts & Athletics, 219 U.S. P.Q. 982 (N.D. Cal. 1982); Ex Parte Olympia Brewing Co., 2 Trademark Rptr. 388 (1912); Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112, 207 U.S.P.Q. 237 (S.D. N.Y. 1980); United States Olympic Committee v. International Federation of Bodybuilders, 219 U.S.P.Q. 352 (D.D.C. 1982); United States Olympic Committee v. Olympic Herrenwaschefabriken Benzer, 224 U.S.P.Q. 497 (TTAB 1984); United States Olympic Committee v. Union Sport Apparel, et al., 220 U.S.P.Q. 526 (E.D. Virg. 1983).

Anti-dilution statutes are intended to protect "strong" marks against the loss of the distinctiveness or

identity of such marks. Allied Maintenance v. Allied Mechanical Trades, 42 N.Y.2d 538, 399 N.Y.S.2d 628, 369 N.E.2d 1162, 198 U.S.P.Q. 418 (1977), Comment, "Dilution: Trademark Infringement of Will-O'-the-Wisp?", 77 Harv. L.Rev. 520 (1964). The mark "Olympic" cannot be considered a strong mark given its historical origins and common meanings. It would be eligible for only minimal, if any, protection under a typical anti-dilution statute. V. Devitt, supra, at 244. Also, any claim by the USOC to exclusivity or distinctiveness must be tempered by the fact that, in 1950, 22,500 commercial enterprises in the United States had a prior legal right to describe them-

selves as Olympic.[17] To emphasize the weakness of the word OLYMPIC, one need only contrast it with a truly strong mark such as XEROX or KODAK.

In addition, the language of the Amateur Sports Act does not at all resemble the language typically found in anti-dilution statutes. For example, Section 12 of the Model State

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[17]A. Guttman, The Games Must Go On 215 (1984). The author correctly pointed out that the word OLYMPIC was in the public domain.

Trademark Act provides relief in the absence of confusion or competition only when the plaintiff can establish "an injury to business reputation or ... dilution of the distinctive quality of a mark."[18] In the absence of similar language in the Amateur Sports Act (or support in the legislative history), it is difficult to see the basis upon which Respondents claim anti-dilution protection. To the contrary, their interpretation of the

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[18]"Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark registered under this Act, or a mark valid at common law, or a trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of good or services." Model State Trademark Act §12 (As Amended), reprinted in R. Callman, The Law of Unfair Competition Trademarks and Monopolies §40.35, Appendix 40, p. 293 (1984).

Amateur Sports Act to provide anti-dilution protection seems to beg the question.

III. THE UNITED STATES OLYMPIC COMMITTEE SHOULD BE ACCORDED NO GREATER SCOPE OF PROTECTION FOR THE MARK "OLYMPIC" THAN IS ACCORDED OTHER FEDERALLY CHARTERED ORGANIZATIONS FOR THEIR RESPECTIVE NAMES.

A. OTHER FEDERALLY CHARTERED ORGANIZATIONS WITH LESS GENERIC DESIGNATIONS HAVE ONLY BEEN GRANTED "EXCLUSIVE USE" PROTECTION.

Express federal statutory protection has been provided for the names associated with many federally char-

tered organizations.[19] However, many other federally chartered organizations do not have such statutory protection.[20] Since Congress intended the USOC Designations to have no more than the protections provided other federally chartered organizations, the protections provided should be no greater than those of other similarly

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[19] See, for example, 36 U.S.C. §691 et seq. (Boy's Clubs of America); 36 U.S.C. §1501 et seq. (National Ski Patrol System).

[20] See, for example, 36 U.S.C. §691 et seq. (Boy's Clubs of America); 36 U.S.C. §1501 et seq. (National Ski Patrol System).

situated organizations. A study of decisional law as related to analogous organizations is instructive.

1. THE SCOUTS

The Boy Scouts and Girl Scouts have been given express protection for their various organizational marks. Each of the cases considering the scope of protection has focused on likely confusion and has considered evidence of confusion. For example, in Adolph Kastor & Bros. v. FTC, 138 F.2d 824 (2nd Cir. 1943), defendant Kastor was selling "Scout" knives that were not endorsed or approved by the Boy Scouts. In enjoining Kastor from further use of the mark SCOUT on its knives, Judge Learned hand held that "the Boy Scouts have a cognizable interest in preventing such possible confusion." 138 F.2d at 825. See also, In Re Boy Explorers

of America, 67 N.Y.S. 2d 108 (Sup. Ct. 1946))("There is no real danger that the general public might be misled and confused by the use of the name 'Boy Explorers of America, Inc.'" 67 N.Y.S. 2d at 111); Boy Scouts of America v. Teal, 374 F.Supp. 1276 (E.D.Pa. 1974)("Here virtually every indicium of Scouting is being misappropriated by defendants in representing themselves to the public, to contributors and even to the United States Navy, as a recognized Sea Scout unit." 374 F.Supp. at 1279); Boy Scouts of America v. Winchester Repeating Arms Co., 15 Trade-Mark Rptr. 142 (1926)("To now permit the applicant to register the word 'Scout' as part of its mark would enable it to place upon the market a knife which would doubtless be regarded as a knife for Boy Scout use and

confusion in the trade would be the natural and probable result of such action." 15 Trade-Mark Rptr. at 143); Girl Scouts of the United States of America et al. v. Hollingsworth, 188 F.Supp. 707, 127 U.S.P.Q. 271 (E.D. N.Y. 1960)("The logical consequence of the defendant's acts and conduct is such as to cause deception." 188 F.Supp. at 715); Girl Scouts of the United States of America v. Personality Posters Mfg. Co., Inc., 304 F.Supp. 1228, 163 U.S.P.Q. 505 (S.D.N.Y. 1969)(By granting the Girl Scouts the sole and exclusive right to have and use its emblems, badges, marks, etc., in carrying out its purposes, "Congress intended only to protect the public and the Girl Scouts from the confusing or illegitimate use of plaintiff's symbols by those who might compete with it in

its normal purposes and endeavors." 304 F.Supp. at 1232. Thus, the USOC Designations by analogy should be granted no greater protection.

Quite properly, the focus in each of the above cited cases was on the possibility of confusion, possibility of deception, false claims of endorsement or approval, or unfair competition. None of the cases cited above applied anti-dilution law standards to determine the scope of federal protection to be granted for words used by the Boy Scouts or Girl Scouts. There is no reason why the federal protection granted to the USOC should be construed more broadly than the protection provided to the Boy Scouts and the Girl Scouts.

2. <u>THE RED CROSS</u>

The Red Cross organization has been given protection for the marks used by it. The words "Red Cross" have been used by many different commercial businesses for many years, including extensive use by Johnson & Johnson for their entire line of surgical dressings and allied products.[21] The power of the FTC to regulate use of the words "Red Cross," for persons who used the words (in particular, for toilet tissue and paper towels) prior to statutory prohibition, was considered in FTC v. A.P.W. Paper, 328 U.S. 193, 90 L.Ed. 1165, 66 S.Ct. 932, 69 U.S.P.Q. 215 (1946). The Court construed the congressional concern in prohibiting use of the words "Red Cross" as being "not only with

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[21] I. Lambert, The Public Accepts (1941)(republished in 1976).

protecting the Red Cross against pretenders but also with protecting the public against the false impression that goods purchased were the products of the Red Cross or were sponsored by it." Id., 328 U.S. at 198. An earlier case considered the use of a Red Cross emblem and the words "Red Cross Hygienic" on toothbrushes, where usage commenced after the statutory prohibition, but was related to previous usage. Loonen v. Dietsch, 189 F. 487 (S.D.N.Y. 1911). Judge Learned Hand explained that commercial uses of "Red Cross" before 1905 "arose from the fact that the Red Cross Society was concerned with field surgery and with the care of, and supplies for, the sick and wounded in battles and great public catastrophes." Id., 189 F. at 488-9.

It is significant that the Court in A.P.W. Paper recognized that the congressional intent in restricting the use of the words "Red Cross" was to protect against pretenders and false impressions of sponsorship. The same intent has motivated Congress to protect the USOC Designations, and the reach of 36 U.S.C. §380 should be limited to protecting against pretenders and false impressions of sponsorship. Moreover, there is reason to provide less protection for "Olympic" than for "Red Cross." As Judge Hand noted in Loonen, commercial uses of "Red Cross" arose because of the activities of the Red Cross Society. However, the word "Olympic" has extensive historical meaning beyond the activities of the USOC or IOC, and the intent of Congress must be interpreted in the

light of the ancient source, and meaning behind, the word olympic, as contrasted with the modern source and derivation of "Red Cross."

3. **THE LITTLE LEAGUE.**

The cases construing the federal statutory protection for the name "Little League" also look to evidence of the likelihood of confusion. Little League Baseball v. All-American Brush, 167 U.S.P.Q. 43 (S.D.N.Y. 1968); Little League Baseball v. Daytona Beach Little League, 193 U.S.P.Q. 163 (M.D.Fl. 1977); Little League Baseball v. Daytona Beach Little League, 193 U.S.P.Q. 611 (M.D.Fl. 1977).

In each of the analogous organizations discussed above, the courts have provided no more than exclusive use protection. Clearly, USOC Designations, terms with a generic history,

should be accorded no greater protection.

B. THE PROPER SCOPE OF PROTECTION FOR THE USOC DESIGNATIONS PARALLELS THE WELL-ESTABLISHED SCOPE OF PROTECTION FOR TRADEMARKS

The trend that emerges from cases in which the scope of "exclusive use" rights has been determined points toward protection that parallels that given trademarks under the common law and the Lanham Act -- no more and no less. That trend should not be surprising: trademark rights are also "exclusive" rights and courts have many years of experience in deciding the limits of "exclusive" trademarks rights. It is thus altogether logical that the USOC Designations be given this common form of protection.

Most important, however, is that the USOC Designations will not suffer with the trademark standard of protection. The USOC, and the public, will still be protected from confusion, passing off, and unfair competition. In sum, the USOC, and the public, will still be protected to the same extent that trademark owners and the public are currently protected under the Lanham Act. There is no reason to believe that that level of protection is insufficient.

C. DEFENSES RECOGNIZED IN TRADEMARK CASES SHOULD ALSO BE RECOGNIZED IN CASES BROUGHT UNDER EXCLUSIVE USE STATUTES

Respondents have argued that certain defenses available under the Lanham Act are not available to Defen-

dants such as Petitioners because the Amateur Sports Act refers only to the remedies provided by the Lanham Act. By the same token, it could be argued that common law defenses have not been prohibited by the Amateur Sports Act. In any event, Respondents appear to misunderstand the nature of the defenses available to a defendant in a trademark infringement suit. While it is true that several defenses are enumerated in the Lanham Act, this merely makes clear that so-called incontestable marks are not exempt from such defenses. Many of those defenses had their genesis in the common law of trademarks, and are natural limitations on the rights of trademark owners.

It is thus only reasonable that the Lanham Act defenses, as well as the common law defenses, apply to actions

brought under statutes such as the Amateur Sports Act. If a word is capable of describing something, as the word Olympic is, then the "fair use in description" defense should be available to protect the rights of the public in that word. In this regard, it is not unreasonable to conclude that the word CLYMPIC has become generic with respect to, or at least descriptive of, multi-event competitive activities. The Oxford English Dictionary gives examples of usage of the word OLYMPIC as early as the 1600's in contexts other than a quadrennial international multi-event sports competition. As much as Respondents USOC and IOC would like to believe that the word OLYMPIC is proprietary in the same manner that XEROX and KODAK are proprietary to their owners, the fact remains that the

word OLYMPIC has been in the English language for hundreds of years and, act of Congress or not, remains in the English language eligible for unlimited use in its generic and descriptive senses.

Similarly, if the holder of the "exclusive use" rights is guilty of laches or has acquiesced in an otherwise infringing use, those equitable defenses should be available to a defendant.[22] Finally, prior use should always be available as a defense, as

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[22]See, e.g., National Association for the Advancement of Colored People, aka NAACP v. N.A.A.C.P. Legal Defense & Educational Fund, Inc., 753 F.2d 131 (D.C.Cir. 1985)(NAACP guilty of laches in bringing suit against Fund; Fund permitted to continue using "NAACP" in its name).

trademark rights arise from use.[23] In sum, there is nothing in the language of the Amateur Sports Act, or in the legislative history preceding its enactment, to indicate that defenses which inhere in the very nature of exclusive rights, such as those granted in the Amateur Sports Act, should be denied to defendants.

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[23]This defense is expressly recognized in the Amateur Sports Act; 36 U.S.C. §380(a). This express provision was probably included to avoid problems involving a governmental "taking" of property that might result if the property rights in marks arising prior to the enactment of the statute were terminated. "Grandfather" clauses are somewhat common in the federal exclusive use statutes. See, e.g., 36 U.S.C. §27 (Boy Scouts); 36 U.S.C. §36 (Girl Scouts).

IV. THE WORDS OF THE STATUTE SHOULD BE HARMONIZED WITH THE CONSTITUTIONAL BOUNDARIES OF THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE AND LIMITED BY THE FIRST AMENDMENT PROTECTIONS

Congress is limited in its power to enact legislation and exert restraints based on the powers granted to it in the Constitution and denied to it by the Bill of Rights. Early trademark statutes enacted by Congress under the Patent and Copyright Clause were declared unconstitutional as an unauthorized extension of power.[24] The federal statute prohibiting unauthorized use of the Girl Scouts name was construed as not prohibiting a lampooning use of the

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[24]See, B. Pattishall, "Two Hundred Years of American Trademark Law." Two Hundred Years of English and American Patent, Trademark and Copyright Law 51-79 (1976).

name, and a state statute was declared (in dicta) to be limited by the First Amendment protections. Girl Scouts of the United States of America v. Personality Posters Mfg. Co., Inc., 304 F.Supp. 1228 (S.D.N.Y. 1969).

An analogous illustration makes clear the unallowable extension of power by Congress. For example, even if Congress should decide that football requires regulation, it would not have the Constitutional authority to establish a Federal Football Committee as a federally chartered organization with exclusive rights to the word "Football." There is no Constitutional provision granting Congress the power to withdraw the word "football" from the U.S. vocabulary, and to prohibit individuals from forming a "football team" or playing a "football game"

except by leave of a Federal Football Committee. Such powers are anathema to the U.S. system of limited government, and challenge the underpinnings of U.S. individual rights protections. International Olympic Committee v. San Francisco Arts & Athletics, 789 F.2d 1320 (9th Cir. 1986)(dissent from denial of petition for rehearing en banc).

CONCLUSION

It would be a great distortion of the existing statutory scheme for protecting the rights of federally chartered organizations, and would be contrary to Congressional intent, to exert restraints on the use of the mark "Olympic" beyond that provided under the likelihood of confusion test as used in the Lanham Act.

Respectfully submitted,

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APPENDIX

APPENDIX

INTERESTS OF AMICI CURIAE

This brief amici curiae is submitted on behalf of The Amateur Athletic Union of the United States, Inc., the Center for Constitutional Rights, and participants and spectators at the 1982 and 1986 Gay Games.

THE AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC. (the "AAU") is a non-profit amateur sports organization which was founded in 1888 for the stated purpose of providing "amateur sports programs and physical fitness for all people -- all classes -- all ages." The AAU has over 80,000 volunteers in 50 associations conducting programs in 31 sports for over 200,000 registered athletes of ages 8 to 80. The AAU is recognized as a national governing body under 36 U.S.C. §391. The AAU is the

owner of the federally registered trademark AAU JUNIOR OLYMPICS and has conducted AAU Junior Olympics competitions since 1948.[25] Recent AAU JUNIOR OLYMPIC competitions have involved more than one million young athletes participating in 21 different sports.

THE NATIONAL ASSOCIATION OF OLYMPIC BUSINESSES is an unincorporated association of commercial businesses which use the word olympic as part of their individual business names, but which do not conduct athletic events.

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[25]**The AAU believes that its use of the AAU JUNIOR OLYMPICS mark prior to 1950 exempts current use of the mark form the Amateur Sports Act by virtue of the "grandfather" clause set forth at 36 U.S.C. §380(a). Nevertheless, the AAU is vitally interested in seeing that the Amateur Sports Act be interpreted narrowly in order to provide the AAU with the broadest possible scope of rights with respect to the AAU JUNIOR OLYMPICS mark.**

The National Association of Olympic Businesses presents the perspectives of the class of businesses which would like to use the word olympic without suggesting a connection with athletic events conducted by Respondents International Olympic Committee or United States Olympic Committee. It is believed that there exist a large number of businesses in this class, such as restaurants, record stores, and pizza parlors, which use the word olympic as part of their individual respective names, but which do not conduct athletic events. Among the businesses consenting to the use of their of their names in this brief are: Olympic Camera of Los Angeles, California; Olympic Homes, Inc. of Portland, Oregon; Olympic Packaging of Mundelein, Illinois; Olympic Medical Corp. of Seattle,

Washington; Olympic Delivery Services, Inc. of Boston, Massachusetts; Olympic Packaging Co., Inc. of Brea, California; Olympic Housewares, Inc. of North Kansas City, Missouri; and Olympic Laundry and Cleaners of Port Angeles, Washington.

Mr. Leo Oliver LaBranche, Jr., is the organizer of The National Association of Olympic Businesses. Mr. LaBranche is a songwriter and phonograph record producer who has a business using the name OLYMPIC RECORDS, and is plaintiff in an action LaBranche v. USOC, CV-85-481-RG, now on appeal to the Ninth Circuit, No. 85-6484. A Petition for Writ of Certiorari to the United States Supreme Court was filed in that case by attorneys for Mr. LaBranche on December 2, 1986.

THE CENTER FOR CONSTITUTIONAL RIGHTS ["CCR"] is a non-profit litigation and educational organization. Founded in 1966, to provide legal support in the southern civil rights movement, CCR has been a national resource for civil rights and social justice. Securing access to full rights for all lesbians and gays has been a priority for CCR.

MARY C. FIGLIULO, KATHERINE J. KREBS, and **LESLIE H. BALMAIN** were participants in the 1982 Gay Games and **KREBS** and **BALMAIN** also participated in the 1986 Gay Games, and both these 1982 and 1986 events were conducted by Petitioner San Francisco Arts & Athletics. **ROBERT J. BARNETT** and **CARL GOODMAN** were spectators at the 1982 and 1986 events, and **SUSAN BARNETT** was a spectator and volunteer organizer in the 1986 event. 59.

The participation and attendance of these individuals at the Gay Games of 1982 and 1986 came as a result of their belief that an international olympic competition of gay and lesbian athletes would project a wholesome and healthy perspective to the public in the face of concerted international attacks upon their civil rights. These individuals desire to attend and participate in future "Gay Olympic Games."